

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1975

\_\_\_\_\_  
No. 75-871  
\_\_\_\_\_

JOHN R. MANSON,

Petitioner,

v.

NOWELL A. BRATHWAITE,

Respondent.

\_\_\_\_\_  
On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Second Circuit

\_\_\_\_\_  
RESPONDENT'S MOTION FOR LEAVE TO  
PROCEED IN FORMA PAUPERIS

\_\_\_\_\_  
Pursuant to 28 U.S.C. §1915 and Rule 53 of the Rules  
of this Court, respondent respectfully moves for leave to proceed  
herein in forma pauperis. Respondent's affidavit in support  
of this motion has been filed and served contemporaneously with  
the filing of this motion.

Respectfully submitted,

*Frank F. Legal*  
\_\_\_\_\_  
FRANK FLEGAL

600 New Jersey Avenue, N.W.  
Washington, D.C. 20001

Counsel for Respondent

January 1976

Supreme Court, U. S.  
FILED  
APR 10 1976  
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

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On Petition for Writ of Certiorari  
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R E S P O N D E N T ' S   A F F I D A V I T

City of Somers, Connecticut: ss

NOWELL BRATHWAITE, being duly sworn, deposes and says:

1. I am the respondent herein, a citizen of the  
United States, and submit this affidavit in support of my motion  
for leave to proceed in forma pauperis.

2. I am presently incarcerated at the Connecticut  
Correctional Institution at Somers, Connecticut.

3. Because I have been incarcerated since 1971, I  
am without finances to pay or give security for the costs of the  
printing expenses in this Court.

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4. My application for leave to proceed in forma pauperis is solely for the purpose of permitting the filing of my opposition to the petition for writ of certiorari in type-written form, and to permit the printing of briefs in the event the petition for writ of certiorari is granted, and not for the purpose of seeking counsel fees for my attorney.

5. I successfully prosecuted an appeal to the U.S. Court of Appeals for the Second Circuit from an order of the United States District Court in Hartford dismissing my application for a writ of habeas corpus, but the State's Attorneys Office in Hartford County has now filed a petition for writ of certiorari in this Court, thereby making me a respondent in this case. I believe that I am entitled to the redress which I sought from the District Court and the Court of Appeals, and my opposition to the State's Attorneys petition is made in good faith and not for the purpose of delay.

Nowell Brathwaite  
NOWELL BRATHWAITE

Subscribed and sworn to before me  
this \_\_\_\_ day of January, 1976.

Notary Public

31 March 1980

75-871

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-871

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OFFICE OF THE CLERK  
SUPREME COURT, U.S.

JOHN R. MANSON, Commissioner of Correction of the  
State of Connecticut, Petitioner,

v.

NOWELL A. BRATHWAITE, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT  
IN OPPOSITION

FRANK F. FLEGAL  
DAVID GOLUB  
MARTHA STONE

Attorneys for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

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NO. 75-871

JOHN R. MANSON, Commissioner of Correction of the  
State of Connecticut, Petitioner,

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NOWELL A. BRATHWAITE, Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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I. STATEMENT OF THE CASE.

A. HISTORY OF THE PROCEEDINGS

The respondent Nowell Brathwaite was found guilty of possession and sale of heroin after a jury trial in Connecticut Superior Court in Hartford, Connecticut on January 14, 1971. He was sentenced on February 5, 1971 to a term of imprisonment of not less than six nor more than nine years. Thereafter, he

-/-

perfected a timely appeal to the Connecticut Supreme Court, which affirmed his conviction on April 5, 1973. State v. Brathwaite, 164 Conn. 617 (1973).<sup>1</sup>

In May, 1974, Brathwaite filed a petition for a writ of habeas corpus in the United States District Court in Hartford, alleging the erroneous admission of identification testimony at his trial had violated his rights of due process. The petition was dismissed by the district court, Blumenfeld, J., in an unreported written opinion,<sup>2</sup> filed on May 14, 1975, based on the court's review of the trial transcript.

Brathwaite appealed from the district court denial of his petition to the United States Court of Appeals for the Second Circuit, which court, Friendly, J., reversed the district court opinion and ordered the State either to retry or release Brathwaite. Brathwaite v. Manson, 527 F.2d 363 (1975).<sup>3</sup> From this decision, rendered on November 20, 1975, the State has petitioned this Court for a writ of certiorari.

This memorandum is submitted in opposition to the State's petition for a writ of certiorari.

B. STATEMENT OF THE FACTS

On May 5, 1970, at 7:45 p.m., police undercover agent James Glover and his informant Henry Brown went to an apartment building at 201 Westland Avenue, Hartford, Connecticut, [Transcript of Trial, pp. 24, 25], for the purpose of purchasing

narcotics from "Dickie Boy" Cicero, a known narcotics dealer who lived in an apartment on the left side of the third floor [T., p. 45]. Glover and Brown entered the premises, observed by back-up officers Michael D'Onofrio and William Gaffey, but by mistake went to an apartment on the right side of the third floor [T., pp. 26, 85].

Glover and Brown described the ensuing events in the building differently.

Glover testified that he knocked on the apartment door and that in response the door was opened twelve to eighteen inches, revealing an unknown black male and female. Glover then asked the man for two bags of heroin, which the man agreed to sell him [T., p. 29]. The door was closed and remained shut for approximately three minutes, presumably while the heroin was procured in the apartment [T., p. 31]. The door was then reopened and an exchange took place with the same man followed by the door being closed immediately thereafter [Id.] Glover and Brown then departed the building, five to seven minutes after entering [T., p. 33]. There was no artificial light in the hallway, although some natural light came in through the windows that evening [T., p. 28].

Brown testified that the exchange had taken place with a black woman, not with a black man [T., p. 87].

After the transaction was completed, Glover and Brown left the building. At 7:53 p.m., eight minutes after their

initial arrival outside the premises, Glover radioed Gaffey that the transaction had been completed [T., p. 11]. Glover then drove to police headquarters where he gave a description of the seller to D'Onofrio [T., p. 36]. Neither Glover nor D'Onofrio knew the identity of the seller at this time.

That evening D'Onofrio proceeded to the Records Division of the Hartford Police Department and secured one photograph of Brathwaite to show Glover [T., pp. 65, 70]. Although neither Glover nor D'Onofrio knew Brathwaite, and although D'Onofrio was furnished with only a general description of the seller, only one photograph of Brathwaite was selected by D'Onofrio from the extensive police files for viewing by Glover [T., p. 41]. The picture had been taken of Brathwaite in connection with a breach of the peace [T., p. 70].

Two days later, Glover looked at the isolated photograph of Brathwaite and identified Brathwaite as the person from whom he had purchased the heroin [T., p. 38]. No explanation was given for the absence of a full photographic array or line-up proceeding, although D'Onofrio did testify that a photographic show-up<sup>4</sup> is not an unusual procedure [T., p. 71].

At the trial, the only evidence linking Brathwaite to the crime was the photographic identification made by Glover on May 7, 1970, and an in-court identification made by Glover during trial on January 8, 1971. In the eight months between the crime and the trial, Glover had had no occasion to see Brathwaite [T., p. 41].

Brathwaite testified that he had been ill at home on the day in question [T., p. 106]. His wife, Eleanor Mae Brathwaite, confirmed that Brathwaite had in fact remained home that day with her [T., p. 165]. Dr. Wesley Vietzke testified as to Brathwaite's medical condition at the time, corroborating Brathwaite's testimony [T., p. 131].

Brathwaite had immigrated to America in March, 1965, and was a native of Barbados in the British West Indies [T., p. 99]. On May 5, 1970, Brathwaite was suffering from a facial tic [T., pp. 138-39].

## II. ARGUMENT.

Although the Second Circuit's interpretation of Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed 2d 401 (1972), in the instant case is in conflict with the holdings of other circuits,<sup>5</sup> and although the rule set forth by the Second Circuit is one supported by the commentators<sup>6</sup> and deserving of this Court's consideration, this case does not present an appropriate vehicle for the next major explication by this Court of the due process standards to be applied to identification law.

The court of appeals' reversal of Brathwaite's conviction was premised on two independent grounds. Not only did the court interpret Neil v. Biggers to be limited to pre-Stovall cases and thus exclude the show-up testimony on a per se basis, but

alternatively it also ruled that even if Neil v. Biggers were applicable to this case, the identification testimony was still erroneously admitted.

The second basis for the court of appeals' reversal is well-supported by the facts of the case<sup>7</sup> and presents no issue worthy of this Court's review. In the absence of review by the Court of this ground, reversal of the court of appeals' holding on the first ground would have no bearing on the outcome of the case, and any decision rendered would, in effect, be no more than an advisory opinion. Under such circumstances, certiorari should not properly be granted. "SS Monrosa" v. Carbon Black Export, Inc., 359 U. S. 180, 184, 3 L.Ed 2d 723, 724, 79 S.Ct. 710, rehearing denied 359 U.S. 999 (1959); Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74, 99 L.Ed 897, 901, 75 S.Ct. 614 (1955). See generally Stern and Gressman, Supreme Court Practice, fourth edition (1969), ch. 4, §4.4, pps. 157-8. "This is especially true where the issues involved reach constitutional dimension, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance become evasion. Cf. the classic rules for such avoidance stated by Mr. Justice Brandeis in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 80 L.Ed 688, 707, 56 S.Ct. 466 [1936]." Rice v. Sioux City Memorial Park Cemetery, Inc., supra.

The State argues that the Court should review the second ground of the court of appeals' decision as well as the first, because, the State contends, the court of appeals exceeded the proper scope of appellate review when it held, contrary to the district court, that the impermissibly suggestive photographic show-up gave rise to a substantial likelihood of misidentification.

This contention is clearly without merit. No evidentiary hearing was held in the district court. The district court's denial of Brathwaite's petition was based solely on a review of the trial transcript, which transcript was also before the appellate court in full. Thus the district court did not base its conclusion on any findings as to demeanor or credibility of witnesses not also accessible to the court of appeals. Indeed, the court of appeals did no more than assess differently than the district court the constitutional significance of the elemental facts presented by the trial transcript, much as this Court did in its reversal of the lower courts in Neil v. Biggers. Neil v. Biggers, supra, at 193, n.3.

The court of appeals clearly acted properly in reviewing the district court's conclusions from the trial transcript, and review by this Court of the court of appeals' action is not warranted to resolve any legitimate issue of appellate procedure, nor necessary to correct any substantive error.

Since the instant case now represents the law in the Second Circuit, it is inevitable that the Court will soon be faced with a decision from that circuit raising solely the issue posed by the limited application of Neil v. Biggers adopted in this case. In the interim, future decisions from the Second Circuit will no doubt analyze and refine<sup>8</sup> the opinion herein, thus providing this Court with a fuller discussion of the bases and reasoning underlying the Second Circuit's holding. Not insignificantly, the Court will, in the future, also be able to observe the impact of the rule adopted in the court below on law enforcement and judicial review of identification issues.

### III. CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari be denied.

THE RESPONDENT

NOWELL A. BRATHWAITE

By Frank F. Flegal  
Frank F. Flegal  
David S. Golub  
Martha Stone  
Attorneys for Respondent

## NOTES

1. See Petitioner's Petition for Writ of Certiorari, at p. 1a.

2. Id., at 5a.

3. Id., at 12a

4. The phrase "photographic show-up" shall be used to describe an identification procedure in which an individual is shown only one photograph and asked to make an identification therefrom.

5. See United States ex rel. Kirby v. Sturges, 510 F.2d 397 (7th Cir.), cert. den. U.S. , 95 S.Ct. 2424 (1975); Nassar v. Vinzant, 519 F.2d 798 (1st. Cir. 1975); Holland v. Perini, 512 F.2d 99 (6th Cir. 1975); compare Smith v. Colner, 473 F.2d 877 (4th Cir.), cert. den. sub nom. Wallace v. Smith, 414 U.S. 1115 (1973), with Stanley v. Cox 486 F.2d 48 (4th Cir.), cert. den. 416 U.S. 958 (1973).

6. As Justice Stevens, while sitting as a circuit judge, has pointed out, "There is a surprising unanimity among scholars in regarding such a rule as essential to avoid serious risks of miscarriage of justice." United States ex rel Kirby v. Sturges, supra, at 405. See Grano, "Kirby, Biggers and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?" 72 Mich.L.Rev. 717, 782-783 (1974); "Recent Developments, Identification: Unnecessary Suggestiveness May Not Violate Due Process." 73 Colum.L.Rev. 1168, 1180 (1973); Note, "Pretrial Identification Procedures--Wade to Gilbert to Stovall: Lower Courts Bobble the Ball." 55 Minn.L.Rev. 779, 794 (1971).

Model Code of Pre-Arrangement Procedure Sections 160.1, 160.2 (Tent. Draft No. 6, 1974). See also Model Rules for Law Enforcement: Eyewitness Identification, Project on Law Enforcement Policy and Rulemaking,

College of Law, Arizona State University, Section 2, (1972), reprinted in Model Code of Pre-Arraignment Procedure, App. VII (Tent. Draft No. 6. 1974).

7. Glover had a very limited opportunity to observe the seller. His only glimpse of the seller came during the two short intervals the door was opened. The door was opened only twelve to eighteen inches [T., p.29], and there was no electric or other artificial lighting in the hallway [T., p. 28] or apartment. Although there was natural light in the hallway, the transaction took at sunset that evening.

Most important, the trial transcript reveals that Glover had, at the most, a matter of a few seconds to observe the seller.

Glover and Brown arrived outside the building at 7:45 p.m. [T., p. 10]. At 7:53 p.m., eight minutes later, Glover and Brown were again outside the building, having completed the transaction and radioing to Gaffey from Glover's car [Id.] D'Onofrio testified that "only three or four minutes" elapsed from the time they had climbed up and down three flights of stairs. Glover testified that he waited at the closed apartment door for approximately three minutes while the seller procured the heroin in the apartment [T., p. 31].

The door was opened the first time only long enough for three short sentences to be spoken [T., p. 30, 31]. The second time the door remained open only long enough for the exchange to occur and was then immediately closed [T., p. 32].

Glover therefore caught only a quick glimpse of the person with whom he conducted the sale, under circumstances of poor lighting and limited view.

Glover's description of the seller was, as the court of appeals noted, easily applicable to hundreds of black males in the Hartford area, and failed to mention anything unusual about Brathwaite's facial appearance or foreign characteristics or accent. Furthermore, Glover waited two days before attempting to make a photographic identification and another eight months before making a physical identification.

8. In this regard, it is possible that the Second Circuit might limit the holding below to cases involving photographic show-ups. The viewing of a single photograph has quite properly been called "the most suggestive and therefore the most objectionable method of pretrial identification," Kimbrough v. Cox, 444 F.2d 8, 10 (4th Cir. 1971), and this Court has expressly criticized such a practice. Simmons v. United States, 390 U.S. 377, 383 (1968). It is possible to construe the opinion below as holding only that the degree of suggestiveness inherent to photographic show-ups makes a substantial likelihood of

misidentification inevitable and therefore does not require a fuller examination of the Neil v. Biggers totality of the circumstances.

Furthermore, because it is conceivable that different standards might well be imposed with respect to photographic identification procedures as opposed to physical identification procedures, resolution of the issue left open in Neil v. Biggers should properly await a case involving impermissibly suggestive physical identification procedures.